

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D. C.

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**AUG 23 1993**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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)  
Implementation of Sections 11 and 13 )  
of the Cable Television Consumer )  
Protection and Competition )  
Act of 1992 )  
)  
)  
Horizontal and Vertical Ownership )  
Limits, Cross-Ownership Limitations )  
and Anti-Trafficking Provisions )

MM Docket No. 92-264

To: The Commission

**COMMENTS OF PAY-PER-VIEW NETWORK, INC.  
D/B/A VIEWER'S CHOICE**

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**COMMENTS OF PAY-PER-VIEW NETWORK, INC.  
D/B/A VIEWER'S CHOICE**

Pay-Per-View Network, Inc. d/b/a Viewer's Choice ("Viewer's Choice"), by its attorneys, hereby submits comments in response to the Commission's Further Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup>

**I. BACKGROUND**

As part of its revised regulation of the cable television industry, Congress has directed the Commission to establish reasonable limits on the number of channels on a cable television system that could be occupied by video programming services in

<sup>1</sup> *In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-264, FCC 93-332 (rel. July 23, 1993) ("FNPRM").*

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which the cable operator has an ownership interest.<sup>2</sup> The two purposes behind these channel occupancy limits were to limit the ability of cable operators to favor video programmers in which the cable operator owned equity, and to ensure that cable channels would be available to a diverse group of video programming services.<sup>3</sup>

In line with the directions of Congress, the Commission has proposed to limit the number of channels on any cable system which could be used by video programmers in which that cable operator has an ownership interest to 40% of all activated channels on the cable system.<sup>4</sup> In calculating the 40% limit, the Commission proposes to count each channel occupied by vertically integrated pay-per-view ("PPV") services.<sup>5</sup> The Commission also proposes to attribute vertical ownership between a cable operator and all programmers in which the cable operator holds a 5% or greater equity interest.<sup>6</sup>

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<sup>2</sup> See Section 11(c)(2)(B) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").

<sup>3</sup> FNPRM at ¶ 168. See, also 1992 Cable Act § 2(a)(5) and S. Rep. No. 92, 102d Cong., 1st Sess. (1991) ("Senate Report") at p. 80.

<sup>4</sup> FNPRM at ¶ 170.

<sup>5</sup> FNPRM at ¶ 217.

<sup>6</sup> See 47 C.F.R. § 73.3555. Congress recommended that the attribution criteria follow those of Section 73.3555, however, Congress did provide the Commission with the flexibility to establish other ownership attribution if appropriate. See Senate Report at p. 80.

## II. INTEREST OF VIEWER'S CHOICE AND SUMMARY OF POSITION

Viewer's Choice is the leading provider of PPV video programming services in the United States. The company is owned by two major motion picture companies and eight multiple system cable operators.<sup>7</sup> In 1987, when Viewer's Choice first began operations under the name of Home Premiere Television, it provided one analog channel of PPV programming. By February 1993 it had increased the number of analog channels offered to three. In August 1993 Viewer's Choice began offering five channels of PPV programming, all of which are produced by third parties (e.g., movie studios, event promoters, etc.). Four of these channels are transmitted by means of digital compression technology over one satellite transponder and one channel, its Viewer's Choice channel, is transmitted in analog.

The primary Viewer's Choice service is a variety channel which is available almost twenty-four (24) hours per day and carries movies, events and other types of video programming having broad viewer appeal. Currently, this channel is available to approximately 11.5 million households. The second channel is named "Hot Choice" and carries three (3) movies per week and late evening specials. The movies repeat in sequence throughout the week. This channel is available to approximately 5 million households. Finally, Viewer's Choice offers three "Continuous Hits" channels each of which carries a single box-office hit

<sup>7</sup>

The owners of Viewer's Choice are Warner Brothers, Walt Disney, Time Warner Cable, Cox Cable, Continental Cable, Comcast, Newhouse, Times Mirror, Telecable and Viacom Cable. Each of the investors in Viewer's Choice holds an equal 10% interest.

movie for a one week period. The movies on each of the "Continuous Hits" channels are replayed continuously.

Viewer's Choice recently purchased a digital transmission system which permits Viewer's Choice to compress its satellite programming transmissions on a five-to-one basis. The digital transmissions by Viewer's Choice began earlier this month with the installation of and the cut-over to the digital compression system.

Viewer's Choice's efforts to increase its transmission capacity to deliver more services is based on its perception that consumers are demanding more control over their television viewing in terms of a wider selection of product and greater flexibility in viewing times. These consumer requirements have fueled the growth of home video outlets and are driving cable operators to deploy greater channel capacity (through fiber optics and compression equipment) and to construct complex switching and storage systems to provide video on demand. Viewer's Choice's expansion plans are designed to coincide with the introduction of increased channel capacity and interactive technology by the cable industry. Thus, when cable subscribers obtain the ability to enjoy video on demand services, Viewer's Choice wishes to be in the marketplace with a multitude of services to serve cable viewers.

Unfortunately, Viewer's Choice believes that the proposals in the FNPRM to create low vertical ownership attribution criteria and to count every PPV channel against a cable operator's 40% channel occupancy limits would seriously impair

the development of PPV services and would hinder, not promote, what the underlying legislation is attempting to achieve -- i.e., the empowerment of consumers with true choice to select programming from a broad diversity of sources and have it available at the convenience of the viewer.

Accordingly, for the reasons set forth below, Viewer's Choice urges the Commission to defer any decision on the treatment of PPV channels with respect to the channel occupancy limits of vertically integrated cable operators. To do otherwise would stifle the ability of major PPV providers such as Viewer's Choice to provide true viewing flexibility just as the technology is being deployed to make this flexibility possible. Furthermore, the Commission should base its attribution criteria for purposes of channel occupancy limits not on the proposed ownership interest of 5%, but on control (defined as either majority voting control or the ability to elect a majority of the board of directors). In the unlikely event that technology does not progress to the point where an almost limitless number of consumer programming choices become available, and if vertically integrated PPV services are blocking the availability of alternative programming services, the Commission could revisit its attribution standards and its treatment of PPV under the channel occupancy limits.

III. THE COMMISSION SHOULD DEFER A DECISION ON THE STATUS OF PPV CHANNELS UNDER THE CHANNEL OCCUPANCY LIMITS

Viewer's Choice submits that the Commission should defer any decision on counting PPV channels towards the channel occupancy limits for vertically integrated cable operators. A decision to include all PPV channels in the channel occupancy limits at this time could significantly hinder the development of PPV by restricting the channel capacity available on cable systems to PPV programming, and thus, limiting the variety and diversity of programming and viewing flexibility available to consumers. Furthermore, counting all PPV channels for purposes of channel occupancy limits will severely penalize the PPV programmers that have made significant capital investments in digital compression equipment to expand their program offerings.

A. Counting PPV Channels For Purposes of Channel Occupancy Limits Will Stunt the Growth of PPV.

PPV programming is still in its infancy. The first PPV programming was offered to subscribers in 1977, and even today, PPV services are available to only one-third of the cable subscriber universe. PPV programming is a prime example of the type of new and innovative programming services that Congress applauded and that was made possible through investments by cable operators. Congress was well aware of the benefits which vertical integration can bring,<sup>8</sup> and it directed the Commission

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<sup>8</sup> H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) at p. 41.



"not to impose limitations which would impair the development of diverse and high quality video programming."<sup>9</sup>

Congress mandated the imposition of channel occupancy limits for the purpose of promoting diversity in video programming.<sup>10</sup> PPV services provide the ultimate in diversity by allowing subscribers to choose the particular program they desire when they desire it. The subscribers pay only for the programs they select. Current PPV services represent the first stage of the "electronic video store" and a stepping-stone to more sophisticated and consumer-friendly video on demand offerings. To ensure that PPV services develop to their fullest potential it is essential that sufficient cable channel capacity be available now. If PPV services are limited to an artificially low number of cable channels, PPV programming services will not be able to provide the flexibility and choice demanded by consumers.

As correctly noted by the Commission, cable operators presently use an entire cable channel to provide a single PPV offering.<sup>11</sup> Thus, PPV programmers require several channels in order to provide subscribers with a wide selection of programs they wish to watch. With deployment of fiber to the neighborhood or to the curb and with the introduction of digital compression within cable systems, cable operators will soon have vastly

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<sup>9</sup> FNPRM at ¶ 199. See, also 47 U.S.C. § 533(f)(2)(G).

<sup>10</sup> Senate Report at p. 80. FNPRM at ¶ 168.

<sup>11</sup> FNPRM at n. 213.

expanded channel capacity available.<sup>12</sup> As the Commission has noted, with such an expansion of channel capacity, channel occupancy limits may soon serve no purpose at all.<sup>13</sup>

Viewer's Choice submits that the interim period between the present and the time of an almost limitless channel universe will be critical for PPV and video on demand. PPV services are positioning themselves to serve the consumer with more and more choices, but with today's technology, that capability simply will require a greater proportion of cable channels. If PPV services are prevented by regulation from occupying these channels now, they cannot afford to prepare to serve the future.

From the cable operator's perspective, before investing in the expansion of channel capacity, the operators will want assurances that there is sufficient programming, including PPV programming, to warrant the investment. If expanded PPV offerings are not available to upgraded operators, because vertically integrated operators who have not yet upgraded are prohibited from allocating sufficient numbers of channels for the PPV services, then, in effect, the Commission will have reduced the diversity and amount of PPV programming that could justify channel growth by cable systems.

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<sup>12</sup> See *Cable '93 - The Cable Industry Looks Ahead*, Satellite News, at ¶ 3, (June 14, 1993); *Digital Television 'Will Change Industry Structure'*, Financial Times, at ¶ 1 (June 10, 1993); *TCI Plans \$2 Billion Fiber Optic Network*, Telecommunicating Review: The Gordon Report (May, 1993); *Time Warner Enters Competitive Access*, Telephone Engineer & Management (March 26, 1993).

<sup>13</sup> FNPRM at ¶ 226.

B. Counting PPV Channels for Purposes of Channel Occupancy Limits Penalizes Those Who Have Invested in Compression Equipment.

PPV programmers, like the rest of the video programming distribution industry, are on the very threshold of digital compression and, in some cases, have already begun deploying the satellite transmission equipment necessary to distribute more programming on a digitally compressed basis. As mentioned above, Viewer's Choice already has deployed a digital satellite transmission system that will permit distribution of PPV programming to more than 540 current Viewer's Choice affiliated systems at a compression ratio of five-to-one.

Viewer's Choice and other PPV programmers made the capital investments in digital compression equipment in order to better serve cable subscribers as more cable channel capacity becomes available. With the channel occupancy limitation now proposed, and with the proposed treatment of vertically integrated PPV services, however, the Commission would undermine significantly the value of this investment. Not only does this penalize Viewer's Choice and other PPV programmers, but it also would disserve subscribers who otherwise would have at their disposal a wider array of program choices and viewing capabilities.

IV. THE COMMISSION SHOULD ESTABLISH OWNERSHIP ATTRIBUTION FOR CHANNEL OCCUPANCY LIMITS BASED ON ACTUAL CONTROL

In its FNPRM, the Commission rejected vertical integration attribution criteria based on control, ownership thresholds of 15-25%, or ownership thresholds that vary on a pro rata basis. The Commission noted that the Senate Report suggests using the

broadcast attribution rules set forth in 47 C.F.R. §73.3555.

However, the Commission also noted that notwithstanding Congress' suggestion, the Senate Report gave the Commission the flexibility to adopt whatever attribution criteria is appropriate.<sup>14</sup>

For the reasons explained below, Viewer's Choice urges the Commission to establish ownership attribution criteria for purposes of channel occupancy limits on the basis of actual control. Viewer's Choice suggests defining control as either majority voting control or the ability to elect a majority of the board of directors. Use of attribution criteria based on the broadcast model, as proposed in the FNPRM, is not appropriate in the context of channel occupancy limits.

The historical development and ownership structures of cable programming services make the proposed broadcast-oriented 5% attribution criteria especially inappropriate with respect to the channel occupancy limits.<sup>15</sup> As the MPAA indicated and as exemplified by the Viewer's Choice's ownership structure, the common practice of vertically integrated cable operators has been to spread the ownership of video programming ventures across several minority positions. In this way, the risk of new programming efforts is shared widely and no one investor has the ability to control the programming decisions of the venture. Moreover, there is no indication that ownership interests of as little as 5-10% are sufficient to motivate cable operators to discriminate in determining what programming to select for

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<sup>14</sup> Senate Report at p. 80. FNPRM at ¶ 197.

<sup>15</sup> FNPRM at ¶¶ 192-95.

carriage. Thus, the application of 5% attribution criteria for channel occupancy limits would penalize cable operators for having taken the risks of developing new services. This penalty would be imposed despite the fact that such low ownership benchmarks do not result in discriminatory favoritism by cable operator/owners or control of program content.

Blind application of the attribution criteria used in the broadcast industry is inappropriate for another reason. Broadcasters represent a relatively few number of editorial view points in any given geographic area, whereas the capacity of a cable system generally is sufficient to accommodate a much greater number of view points and programming choice. Here again, a strict ownership threshold of 5% is unnecessary to achieve the diversity goals that Congress was pursuing through the channel occupancy limits.


CONCLUSION

For the foregoing reasons, the Commission should defer any decision as to whether PPV channels should be included in the calculation of channel occupancy limits because of the ill-effects such inclusion will have on the development of PPV programming. The Commission should also base the ownership attribution of vertically integrated cable operators on actual control.

Respectfully submitted,

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